No. 351

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SUPREME COURT OF THE UNITED STATES

LESLIE MILLER, INC. ..... *Appellant*

v.

STATE OF ARKANSAS ..... *Appellee*

APPEAL FROM
SUPREME COURT OF ARKANSAS

MOTION TO DISMISS

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> icy does not require. *Reconstruction Finance Corp.* v. *J. G. Menihan Corp.*, 312 U.S. 81, 85 L. ed. 595, 61 S. Ct. 485, and cases cited; *Colorado Nat. Bank* v. *Bedford*, 310 U.S. 41, 53, 84 L. ed. 1067, 1074, 60 S. Ct. 800, and cases cited; cf. *Baltimore Nat. Bank* v. *State Tax Commission*, 297 U.S. 209, 80 L. ed. 586, 56 S. Ct. 417. Our inquiry here, therefore, must be whether the state's regulation of this contractor in a matter of local concern conflicts with Congressional legislation or with any discernible Congressional policy."

Here, if in fact the State law burdens or interferes with the performance of the federal function as alleged, Congress has been free to alleviate the condition.

Appellant has selected various sections of the statute which, it alleges, directly affect the power of the government to act. These provisions in no manner burden the government and even so at most it "gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct." *Trinityfarm Construction Co.* v. *Grosjean, supra.*

Appellant argues that requiring a license on projects exceeding $20,000 limits the government's selection to only licensed contractors; that the Board's meetings are too irregular; and, that applications must be filed 30 days prior to the meetings. Frankly we fail to see the burdensome aspect of these requirements. Appellant would have this Court believe that only a few out-of-State contractors are licensed. This simply is not true. Numerous out-of-State contractors are licensed, and no allegation of discrimination by the Board has been made. Appellant ignores the fact that contractors know of most jobs long before invitations to bid are released. Moreover, procurement regulations require that advertisements for bids be at a sufficient time previous to the contract to permit

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Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal from the judgment of the Supreme Court of Arkansas in the above entitled cause be dismissed on the ground that the issues raised have been expressly passed on.

STATEMENT

As indicated by petitioner in its jurisdictional statement, this is a direct appeal from the final judgment of the Supreme Court of Arkansas rendered on July 4, 1955, in which the court affirmed a judgment of the Pulaski County, Arkansas, Circuit Court, First Division, which found petitioner guilty of violating the Arkansas Contractors Licensing Law, Act 124 of the Acts of Arkansas of 1939, as Amended, Sections 71-701, *et seq,* Arkansas Statutes of 1947 annotated.

Petitioner states that the statutory provision for jurisdiction of this appeal is Section 1257(2), 28 U. S. C. A. We submit that the State statute here invloved is not repugnant to the Constitution of the United States or any of the laws of the United States.

"such full and free competition as is consistent with the procurement of types of * * * services necessary to meet the requirements of the agency concerned". 41 USCA Sec. 152 (a). Then too, the United States recognizes the fact that the Board meets on an average of 18 times a year. (Amicus Curiae Brief p. 19.) Not one instance of abuse of discretion by the Board or undue delay has been cited. Any qualified contractor can become licensed in Arkansas within a 30- to 45-day period and we fail to see any burden attached to this procedure.

Appellant next argues that the statute operates to eliminate the lowest responsible bidder because that bidder is not licensed. This is a "back-door approach" and not logically sound because it assumes that unlicensed contractors will always be low bidders. This in effect, appellant says, will result in higher costs and further restrict the government in its choice of free agents. This choice of free agents argument is no different from the "economic burden" argument which this Court has many times rejected. In the Penn Dairies case, *supra*, this Court said:

> "By the exercise of control over the seller, the regulation imposes or may impose an increased economic burden on the government, for it may be assumed that the regulation if enforcible and enforced will increase the price of the milk purchased for consumption in Pennsylvania, unless the government is able to procure a supply from without the state, see *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U.S. 511, 79 L. ed. 1032, 55 S. Ct. 497, 101 ALR 55. But in this burden, if Congress has not acted to forbid it, we can find no different or greater impairment of federal authority than in the tax on sales to a government contractor sustained in *Alabama* v. *King & Boozer*, 314 U.S. 1, 86 L. ed. 3, 62 S. Ct. 43, 140 ALR 615, *supra;* or the state regulation of the operations of a trucking company in performing its contract with the government to transport workers em-

ARGUMENT

The Federal Question Presented Has Been Decided by This Court Adversely to Petitioner's Position

Petitioner sets out that the issue presented by this appeal is whether the conviction of petitioner for engaging in business as a contractor by submitting a bid to the United States and executing and performing a contract with the United States for military construction in Arkansas without first becoming licensed in Arkansas pursuant to the Arkansas Contractors Licensing Law was constitutional, when, (1) the objectives and purposes of the Arkansas law are afforded by Federal statutes and regulations; (2) the Arkansas law impairs the exercise of Federal functions; and (3) the Arkansas law is inconsistent with Federal laws regulating procurement. The authorities we rely upon are set forth in the opinion of the Supreme Court of Arkansas and clearly hold that the State statute here involved is a proper exercise of the police powers of the State for the protection of the public health, welfare and safety of the citizens of this State; that this statute does not impair the exercise of Federal functions; and, that it is not inconsistent with the Federal laws regulating procurement. Therefore it would serve no useful purpose to herein argue these authorities, and we respectfully submit that the appeal should be dismissed.

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